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# LAWYERS' MALPRACTICE: A COMPARATIVE APPRAISAL

David O. Haughey\*

## I. Introduction

If we were to play the psychologists' word association game with a representative group of lawyers, most of them would probably associate the term "malpractice" with physicians and surgeons. Such responses would be entirely appropriate because certainly the law of professional malpractice has developed overwhelmingly in the field of medicine, as compared to other professions. Very likely the average physician knows more about professional malpractice than the average lawyer, and a very great many of them have acquired their familiarity with the law of professional malpractice from bitter personal experience. The appellate court reports in every jurisdiction are loaded with medical malpractice cases of all kinds, and medical and legal journals frequently publish articles discussing a wide variety of problems related to medical malpractice. Anyone interested in studying any phase of medical malpractice can find an almost inexhaustible and constantly increasing body of literature on the subject.

But on the subject of attorneys' malpractice the literature is surprisingly meager;<sup>1</sup> the appellate cases are relatively few; and it is probably safe to say that the great majority of lawyers have never been sued for malpractice and are not acquainted with a lawyer who has been sued.

Since there are almost as many lawyers practicing in this country as there are physicians,<sup>2</sup> and since lawyers as a group are probably no more perfect in the practice of their art than are the physicians and surgeons, the great disparity in the incidence of malpractice claims in the two professions begs for an analysis to explain it.

## II. Some General Observations

Of course one obvious explanation for the vast number of malpractice suits against physicians and surgeons, as compared with the relatively small number of such suits against lawyers, is the plain and simple fact that the errors of physicians and surgeons result in bodily injury, impairment of bodily function, or death for which there is usually no specific ceiling on monetary damages, and claimants can always hope for a large award. An attorney's mistake, on the

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1 The entire subject of the liability of attorneys for malpractice occupies just 34 pages in *American Jurisprudence 2d* (7 AM. JUR. 2D *Attorneys at Law* §§ 167-200 (1963)). For comparison the liability of physicians and surgeons for malpractice is treated in *American Jurisprudence 2d* in 145 pages (61 AM. JUR. 2D *Physicians, Surgeons, and Other Healers*, §§ 105-222 (1972)). Specific comparison of the volume of appellate cases has not been attempted, but the disparity is undoubtedly greater. Medical malpractice is one of the favorite subjects for legal seminars, but rarely, if ever, has any significant legal seminar been devoted to lawyers' malpractice.

2 In Michigan, for instance, there are somewhat more than 12,500 lawyers, about 12,000 M.D.'s and about 3,000 D.O.'s.

other hand, is more likely to result in a limited loss of money or property. Money and property simply do not occupy the sacred position in our society enjoyed by life and health. People seemingly have a tendency to take the loss of money or property with a minimum of concern compared with the normally intense reaction to an insult to life, limb or health.

Another rather obvious factor, which our friends in the medical profession are quick to point out, is that all lawsuits are handled by lawyers, and tried in courts wherein the judges are lawyers, and all the rules are made largely by lawyers. With all the apparatus for adjudicating malpractice liability under the control of lawyers, the embattled medical profession tends to look at this factor for an explanation for the relatively safe haven enjoyed by lawyers in the area of malpractice.

In this article we will be examining some of the lawyers' malpractice cases to determine the degree to which lawyers have enjoyed a favored position in the law of malpractice, some of the reasons and justifications for that situation, and what some of the trends may be for the future.

### III. A Look at History

It should be noted at the outset that one obviously cannot get a fair impression of the frequency of malpractice claims against attorneys by examining appellate case reports. Obviously there is and always has been a substantial body of claims against lawyers for malpractice that never reach the appellate courts.<sup>3</sup> Many of these involve the rather obvious inadvertent and essentially clerical errors which most lawyers worry about, wherein the liability is quite obvious. Presumably most such claims are settled either without suit, or at the trial court level. When attorneys think of malpractice in connection with themselves, they usually think in terms of these essentially clerical hazards arising in any active law office, such as:

- Failing to start a suit on behalf of a client within the time allowed by the statute of limitations.

- Failing to answer a suit on behalf of a client so as to avoid the entry of a judgment by default.

- Failure to take the necessary timely steps to perfect an appeal.

- Failure to timely file a claim on behalf of a client in a bankruptcy or probate or similar proceeding.

- Failure to record a deed or mortgage or other document affecting title to real estate or chattels.

- Making an error in a legal description in a deed or mortgage.

- Failure to discover a material title defect when rendering an opinion on title to real estate.

- Errors and delays in preparation, execution or filing of documents.

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<sup>3</sup> Of course the same can be said with respect to medical malpractice cases. I know of no figures to prove it, but I would suspect that a greater proportion of lawyers' malpractice cases are settled without trial than medical malpractice cases.

Other errors and omissions which should be avoidable by a careful lawyer.

Every lawyer is aware of these hazards, and is aware that he can incur liability to a client when such mistakes arise. Except as to assessment of damages this type of mistake presents no great problem in the law of malpractice, and their frequency cannot be judged by the number of cases in the appellate reports.

Of course this type of inadvertent mistake is more or less akin to that class of cases involving physicians and surgeons where an obvious mistake has been made through inadvertence such as amputating the wrong leg. There can be no real room to dispute that a mistake was made. There is little or no valid justification for the error. The real dispute is usually as to the damages sustained.

Historically, most of the lawyers' malpractice cases involve this general type of inadvertent mistake.<sup>4</sup> Liability of a lawyer arising from his fair and honest and considered exercise of professional judgment, on the other hand, has been relatively infrequent.

As even a cursory glance at the medical malpractice literature will reveal, physicians are frequently held liable for malpractice in situations in which they made no inadvertent error; they made no blundering mistake; and there was no lack of attention to the patient. The typical medical malpractice claim is more likely to arise from a situation in which the physician made, or is claimed to have made, an earnest, good-faith error of professional judgment in making a diagnosis or in providing treatment. In many medical malpractice cases it cannot really be said that the physician did something by mistake that he knows very well he should not have done, or that he failed to do something that he knows very well he ought to have done. Certainly in a large proportion of the medical malpractice cases the accused doctor can and usually does very plausibly claim that his actions with respect to his patient were taken as the result of his considered and deliberate exercise of his best professional judgment, and the lawsuit arises usually because some other physician feels that the defendant's professional judgment was wrong.

It is certainly not uncommon for a physician faced with a malpractice judgment against him, affirmed on appeal, to continue to honestly assert that his diagnosis and treatment were proper, and he would repeat it if a similar situation should arise. And other good doctors will agree with him.

Indeed, it is fairly common in a medical malpractice trial to hear the plaintiff's counsel tell the jury in argument that the defendant is a good, conscientious doctor who did his best for the plaintiff, but unfortunately he was mistaken in his diagnosis or treatment, as plaintiff's experts have so convincingly explained;

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<sup>4</sup> The cases usually speak of the attorney's duty in terms of exercising reasonable care and diligence, and the exercise of good faith, sound professional judgment, but in most cases the actual error turns out to be essentially clerical, or one arising from ignorance of a clear rule of law established by statute, rule, or settled decision. Although clear and specific requirements of the law can be overlooked because of ignorance on the part of the lawyer, as opposed to a clerical oversight, such error certainly is not the result of a considered exercise of professional judgment. It's a type of mistake the lawyer can explain, but it is difficult to justify. It is more charitable to include this type of error under the general classification of inadvertence.

and in all justice the good doctor should help the patient bear the burdens of the resulting injury. And the good doctor often does so, at the command of the jury.

Lawyers are also sued occasionally for claimed errors of good faith professional judgment, but on a comparative basis the cases are infrequent and they are generally defeated. The more typical malpractice charge against the lawyer is based on some sort of mistake that the lawyer never intended to make, and would not have made except for some inadvertence, and is not likely to repeat.

This apparent favored position of the legal profession in the field of malpractice is something that attorneys handling malpractice litigation are constantly reminded of by the physician defendants with whom they come in contact in the prosecution or defense of medical malpractice cases. *Is this favored position simply the result of the control of the judicial apparatus by lawyers? Is there justification for it? Will it, and should it continue?*

There has been little discussion in the cases or in the general literature of lawyers' malpractice from the point of view suggested by those provocative questions, which are posed from time to time in various forms by embittered doctors to their attorneys. It is to these questions that this article is principally addressed.

#### IV. Breach of Fiduciary Duty

Although lawyers enjoy relative immunity in many areas of malpractice, they also have their own cross to bear. There is a class of cases which is frequently analyzed in terms of attorneys' malpractice, and properly so, but which involve an added important element of the breach of some fiduciary duty owed by a lawyer.<sup>5</sup> Such cases usually involve ethical considerations peculiar to the legal profession. They frequently arise from good faith inadvertence, mistake, or ignorance on the part of the lawyer. But they certainly represent an area in which lawyers are likely to be held liable for actions which would be permitted to others. Lawyers do not enjoy a favored position in this area; on the contrary they are judged by more stringent rules. Because of the unique ethical standards adopted by, or imposed upon the legal profession, this class of case represents a phase of professional malpractice in which attorneys are peculiarly vulnerable. Because of elements of fraud (or constructive fraud) involved in most of these cases, they do not really fit the definition of malpractice as the term is being used

<sup>5</sup> This is probably the most frequent type of case in which lawyers are involved as litigants. Typical of the Michigan cases are: *Dean v. Radford*, 141 Mich. 36, 104 N.W. 329 (1905), where an attorney failed to make a timely interest payment on behalf of a client from funds left with the attorney for that purpose; *Olitkowski v. St. Casimer's Saving and Loan Ass'n*, 302 Mich. 303, 4 N.W.2d 664 (1942), where the attorney advised the deposit of fiduciary funds in an unauthorized depository in which the attorney had an undisclosed interest, and the depository failed; *Storm v. Eldridge*, 336 Mich. 424, 58 N.W.2d 129 (1953), where the attorney was also a real estate broker, and seemed to be acting in both capacities; *Walter v. Pierson*, 359 Mich. 161, 101 N.W.2d 289 (1960), another case of an attorney engaged in the real estate business; and *Kukla v. Perry*, 361 Mich. 311, 105 N.W.2d 176 (1960), where an attorney engaged in business transactions with his client without revealing personal adverse interests. All of these and many, many other cases include elements of fraud, constructive fraud, or breach of ethics.

for the purpose of this article. Nevertheless they are frequently analyzed by the courts as malpractice cases and seem to constitute the largest number of appellate cases involving attorneys. Typical of these cases are situations in which an attorney enters into an ordinary business relationship with his client, or acts on behalf of his client in the conduct of some business transaction which the client might have conducted himself. He is really acting as a businessman rather than as a lawyer, but he happens to be a lawyer and one of the parties with whom he is dealing happens to be his client. This general class of case is pointed out principally to eliminate it from our consideration, and to point out that in this fairly frequent type of case the attorney is likely to be judged by a more strict standard than others, because of the peculiar fiduciary relationship between himself and his client.

### V. Obvious, Inadvertent Errors

We have listed above some of the more obvious mistakes that an attorney is likely to make in the conduct of his practice. These are situations where he knows better (or certainly ought to know better) and the error generally results from inattention or clerical error, as distinguished from a considered exercise of professional judgment. In this class of cases the courts generally have no difficulty in deciding that the lawyer is guilty of malpractice, and the issues litigated are more likely to center on questions of damages, and whether the party suffering the damages is one to whom the attorney owes a duty.

Where the attorney's error is in connection with litigation (for instance failing to start suit within the time allowed by the statute of limitations, failing to take the necessary timely steps for appeal, or failing to answer a suit so as to avoid a default)<sup>6</sup> the problem is generally whether the client sustained damages, and if so the amount thereof. If an attorney has been retained to commence a suit on behalf of his client, but for some reason fails to commence suit within the time allowed by the statute of limitations although having the opportunity to do so, the courts appear to generally agree that the burden is upon the claimant to prove not only the duty and default of duty on the part of the attorney, but he must also assume the burden to show that the lawsuit which his attorney sacrificed to the statute of limitations would have been successful if timely commenced.<sup>7</sup> He does not make a *prima facie* case simply by demonstrating that the attorney was responsible for permitting the statute of limitations to be a bar to his claim. And the burden imposed upon the plaintiff is not merely to demonstrate *the damages* which he could have proved in the underlying litigation, but, possibly of even more importance, he must prove that he would have been entitled to *recover* damages in the underlying litigation.<sup>8</sup>

6 For the purpose of the present discussion, this type of error is best limited to the obvious, demonstrable, unarguable mistake.

7 See generally Annot., 45 A.L.R. 2d 22 (1956).

8 A rather dramatic example of the effect of the burden of proof rule is *Cornelissen v. Ort*, 132 Mich. 294, 93 N.W. 617 (1903). The defendant attorney's liability for failure to perfect an appeal was limited as a matter of law to fees incurred by the plaintiff in an unsuccessful effort to obtain a delayed appeal, where plaintiff evidently thought he had made a *prima facie* case for the value of the land that he lost due to the failure of the attorney to per-

This situation gives to the attorney who is obviously guilty of malpractice many opportunities to completely escape liability, upon the ground that the claimant is unable to demonstrate that the claim lost to the statute of limitations would not have been lost anyway on the merits of the claim.

But does the assignment of such a burden of proof to the plaintiff in such a case give to the attorney a more favorable rule of law than is enjoyed by any other tortfeasor? There is certainly nothing unusual about assigning to the plaintiff in a tort case not only the burden of proving the defendant's basic liability, but also the burden of proving the fact of damage and the amount thereof. The only difference would appear to be that in the ordinary tort case, including cases of medical malpractice, the existence of some damage is fairly evident.

Nevertheless, an attorney defending himself against a client whose claim he lost to the statute of limitations has some advantages which would not have been available to the defendant the client wanted to sue. He ordinarily will have consulted extensively with the client, and will have learned not only the strengths of his client's claim, but also its weaknesses, and might well be in a better position to defend on the merits of his client's underlying claim, than the intended tortfeasor would have been.

Examination of the cases fails to suggest any serious assault upon these rules as to burden of proof in such cases. However, a convincing argument could be made, with some logical basis, that the burden should be shifted to the defendant attorney in such cases to demonstrate that the client's cause of action (which the attorney lost to an avoidable technical rule such as the statute of limitations) was not a meritorious claim. Although the analogy may not be completely appropriate, the *res ipsa loquitur* cases would suggest the theory.<sup>9</sup> The attorney in such a case will presumably have advised his client that there is at least some basis to proceed against the intended defendant, with some hope of recovery, or he should not have accepted the retainer. Therefore, it might not be too unreasonable to require the attorney to prove the lack of merit in the claim he encouraged his client to pursue. Of course as a practical matter, in this kind of situation, the assignment of the burden of proof on such an issue probably does not have any overriding importance, except in the occasional situation in which the parties both avoid offering proof on the issue, hoping to prevail on the strict legal issue of who had the burden to proceed.<sup>10</sup> Once the

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fect an appeal. A rare example of a case wherein the claimant, whose case was lost by the attorney to the statute of limitations, was almost completely successful in meeting all of his burdens of proof, surviving appellate review, is *Christy v. Saliterman*, 288 Minn. 144, 179 N.W.2d 288 (1970). The attorney sacrificed a medical malpractice claim to the two-year statute of limitations and the plaintiff, assuming the burden of proving two malpractice claims (against the attorney for his negligence in failing to start suit, and to demonstrate the underlying liability of a psychiatrist in his treatment) obtained a verdict of \$157,158.00 against the lawyer, which was reduced to \$100,000.00 upon the appeal.

9 One of the best treatments of the *res ipsa loquitur* doctrine will be found in 1 FRUMER & FRIEDMAN, *PRODUCTS LIABILITY* § 12.03 (1968).

10 This appears to have been the case in *Cornelissen v. Ort*, 132 Mich. 294, 93 N.W. 617 (1903). Neither side offered any proof as to the merits of the underlying claim which the attorney had lost at the trial level, and then had failed to perfect the appeal which he had himself recommended. The court in that case actually ruled that the plaintiff was not entitled to recover against the attorney for the value of the land, because the ruling of the trial court in the underlying case was that the plaintiff was not entitled to the land, and since the issue was not appealed the judgment of the trial court was the law of the case, plaintiff was bound

parties join battle on an issue, and present their witnesses and make their arguments, and a jury question is established, most trial attorneys take relatively little comfort from the fact that the other fellow may have the burden of proof.

The situation is not a great deal different in other typical situations of more or less inadvertent errors, such as failing to properly record a security document,<sup>11</sup> or failing to discover a title defect in certifying title to real estate.<sup>12</sup> In such cases there may be no damage, and the aggrieved party has the burden of proving that there was, and how much. But there is typically an added element in many of the cases involving title opinions on real estate. The party who really sustains the damage may not be the attorney's client, but some third party who relied to his detriment on the attorney's erroneous certificate.

## VI. Liability to Third Parties

It seems to have been a fairly firm historical rule that an attorney has no liability for his malpractice, except to his client.<sup>13</sup> Yet very frequently, particularly in cases of real estate title opinions, it is someone other than the client who is damaged. This is one area in which it does seem that attorneys enjoy a favored position in the law which is difficult to justify as a universal rule.

Very frequently a client will obtain a title opinion on real estate from his attorney for the specific purpose of demonstrating his ownership of the land in order to obtain a mortgage loan, or to successfully sell the land. The attorney in rendering his opinion may be fully aware of the fact that the opinion is needed to convince some third party of ownership, rather than to reassure the client. Yet the rule appears to be quite firm that in the absence of an attorney-client relationship between the parties, there can be no liability on the part of the attorney for an erroneous title opinion or other similar certificate.<sup>14</sup>

There is good reason to believe that this restrictive rule may be weakening, and may be changed, as perhaps it should at least in some circumstances. There is certainly plenty of analogous authority to mount an assault on a rule which universally limits the malpractice liability of the attorney to his client. In every jurisdiction the courts have recognized that the concept of privity is an anomaly in tort litigation.<sup>15</sup> It almost seems unreal in this day and age to recall that not so long ago the manufacturer of a defective product could be liable only to the pur-

by it, and could have no damages for the loss of land to which he was not entitled. One gets the impression from the opinion that, regardless of what he might have proved, there was no way the plaintiff could have won. One would hesitate to put much stock in that reasoning today.

<sup>11</sup> See generally Annot., 87 A.L.R.2d 991 (1963).

<sup>12</sup> Annot., 5 A.L.R. 1389 (1920).

<sup>13</sup> See McDonald v. Stewart, 289 Minn. 35, 182 N.W.2d 437 (1970), for a recent application of this rule.

<sup>14</sup> See Savings Bank v. Ward, 100 U.S. 195 (1879), where the Supreme Court clearly ruled that an attorney can be liable on his erroneous title opinion only to his client, although dissenting justices felt there should be liability to persons other than the client if the attorney knew that his certificate was to be used by the client to obtain a mortgage loan, and it was given for that purpose. In general agreement with the majority in *Savings Bank* are *Currey v. Butcher*, 37 Ore. 380, 61 P. 631 (1900); *Dundee Mortgage & Trust Inv. Co. v. Hughes*, 20 F. 39 (C.C.D. Ore. 1884); *Kasen v. Morrell*, 18 Misc. 2d 158, 183 N.Y.S.2d 928 (Sup. Ct. 1959); *Maneri v. Amodeo*, 38 Misc. 2d 190, 238 N.Y.S.2d 302 (Sup. Ct. 1963).

<sup>15</sup> See 1 FRUMER & FRIEDMAN, PRODUCTS LIABILITY § 5.03 (1972).



chaser, when it was obvious that the hazard of injury because of the defect extended to anyone who might come in contact with the product.<sup>16</sup>

Certainly, in most situations the relationship between attorney and client is a personal one and the attorney's duty is solely to his client, and ordinarily the attorney should not have to be concerned with the effect his representation of his client may have on third parties. However, where the attorney renders opinions with respect to title to real estate, the validity of some corporate action, or some other matter with clear expectation that specific, identified, or identifiable third parties will rely upon it, there is good reason to make an exception to the otherwise justifiable rule that only the client can complain.

Indeed, some recent cases certainly suggest the carving out of such an exception.<sup>17</sup>

Of those which do, an interesting class of cases involves the situation wherein an attorney has prepared a will for his client which fails of probate because of an error on the part of the attorney, or where some particular portion of the will is ineffective for some reason chargeable to the attorney. Ordinarily by the time the will or some part thereof is demonstrated to be ineffective, the testator is not around to complain. Those suffering damages are the disappointed beneficiaries who typically enjoyed no client relationship with the attorney, at least in connection with the drafting of the will. Limiting the liability of the attorney to the client just about insulates the attorney from any liability for his mistake.<sup>18</sup>

Quite a number of these cases have arisen in California, where it would appear that at least in this class of cases the attorney can be held liable to a third party—the disappointed legatee.<sup>19</sup> It is very difficult to find much fault with this extension of liability to a non-client, provided it is limited to the situation where the trouble clearly arises from the attorney's error and not from a dispute between the disappointed legatee and the attorney as to how the testator intended to dispose of his property in his will.

Permitting the legatee or beneficiary to sue the draftsman of the will should not be countenanced as a vehicle to litigate a dispute as to the testator's inten-

16 It was not until 1916, with the famous case of *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050 (1916) that the automobile manufacturer was held liable to the retail purchaser of the automobile for negligence in manufacture causing injury. And even after that logjam was broken, it took quite a while for the courts generally to get rid of the concept of "privity" in connection with product liability. See generally 1 FRUMER & FRIEDMAN, *PRODUCTS LIABILITY* § 5.01 (1964).

17 For an interesting and provocative discussion of this general subject see Note, *Public Accountants and Attorneys: Negligence and the Third Party*, 47 NOTRE DAME LAWYER 588 (1972). The history and trends of the liability of accountants and attorneys to third parties are traced with respect to their certificates of opinion relied upon by third parties.

18 Most of the cases are collected in Annot., 65 A.L.R.2d 1363 (1959) and supplements.

19 See, e.g., *Lucas v. Hamm*, 56 Cal. 2d 583, 15 Cal. Rptr. 821, 364 P.2d 685 (1961), cert. denied, 368 U. S. 987 (1962), and cases cited therein. Although in *Lucas* it was held that the disappointed beneficiary, who was not a client of the attorney, could properly sue the attorney who drafted the will for his negligence in that connection, recovery was denied because the court felt that malpractice had not been proved. Other cases recognizing the right of a disappointed legatee or beneficiary to recover against the attorney who drafted the will, in certain situations, are *Licata v. Specter*, 26 Conn. Supp. 378, 225 A.2d 28 (C.P. 1966) (insufficient number of attesting witnesses); *Schirmer v. Nethercutt*, 157 Wash. 172, 288 P. 265 (1930) and *Woodfork v. Sanders*, 248 So. 2d 419, (Ct. App.) writ denied, 259 La. 759, 252 So. 2d 455 (1971) (legatee was a subscribing witness and therefore disqualified as a legatee).

tions. It should be limited to situations where the testator's intentions, as determined from the terms of the will or trust itself, are frustrated by the attorney's mistake, as in failing to secure the requisite number of attesting witnesses, allowing a legatee to be an attesting witness, or some other error of form which prevents the execution of the testator's clear purpose. To call into question in a suit against the attorney, whether the attorney properly interpreted the testator's intent, would seem to be an unacceptable intrusion into the confidential attorney-client relationship, and it would frustrate the settled law governing wills and trusts.<sup>20</sup>

There is really not much distinction between the case of the ineffective will and the erroneous real estate certificate. In the case of the will it is obvious that only intended beneficiaries, and not the testator client, will ever be in a position to claim damages.<sup>21</sup> With respect to real estate title opinions and similar certificates there may of course be damage sustained by the client, and there are certainly cases in which the attorney's opinion is intended, by both the attorney and the client, solely for the use and benefit of the client. In such cases it seems right and proper that only the client can complain. The title opinion constitutes personal and confidential advice to the client. Others should seek and rely on their own counsel. But there are certainly many situations in which an attorney should and does expect that his certificate will be relied upon by third parties, and it is prepared for that purpose.

It is submitted that attorneys have no right to expect that the older cases strictly limiting their liability to clients will continue to be the law. For most of the functions of an attorney the rule limiting his liability to his client is essential to the maintenance of the basic concept of the attorney-client relationship. In most situations the attorney is expected to faithfully represent the interest of his client to the exclusion of any consideration of the effect such representation may have on third parties. He is expected generally to be the advocate of his client—to advance the interest of his client to the maximum extent consistent with law and ethics. This role would be impaired considerably if non-clients could sue the attorney for damages arising from the attorney's acts on behalf of his client. Very often the very advantage derived by a client from the services of his attorney means a proportionate disadvantage to someone else. To open the gate to such claims would change the lawyer's basic role from advocate to a sort of informal judge or umpire, paid by one side of a dispute—an entirely unacceptable role.

Except in those isolated instances where the basic intent and purpose of the

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20 This problem is suggested by *Heyer v. Flaig*, 70 Cal. 2d 223, 74 Cal. Rptr. 225, 449 P.2d 161 (1969), wherein the principal issue discussed is the application of the statute of limitations (holding that the statute will not start to run until the death of testator). This case comes close to holding that the attorney drafting the will can be held liable for misinterpretation of the testator's desires based on proof extraneous to the will. To that extent the case would appear to state bad law, or could be interpreted to stand for bad law. The subsequent case of *Hiemstra v. Huston*, 12 Cal. App. 3d 1043, 91 Cal. Rptr. 269 (1970) states what would certainly appear to be the better rule that in a suit for malpractice against the attorney who drew the will the testator's intention and purpose must be gleaned solely from the will.

21 Of course the still living testator, or even possibly his estate, might conceivably make claim against the attorney for attorney fees expended for an ineffective will.

attorney's service is to create rights for specific third parties as in a will or trust, or to induce specific action on the part of third parties as is often the case with the lawyer's certificate, his liability should be limited strictly to his client.

## VII. Considered Professional Judgment

All of the situations which we have discussed so far relate to the lawyer's liability for errors and omissions which are fairly obvious, and whether inadvertent or not, there can be little doubt that a mistake was made. Usually, when it can be demonstrated beyond any room for argument that the attorney made a mistake, the error is essentially clerical or inadvertent. The lawyer often has an explanation for it, but little excuse. A careful, informed lawyer simply would not have made the mistake, and the accused lawyer generally looks to the damage issues for his defense.

### *A. Clear Errors of Professional Judgment*

There are many situations in which a lawyer makes no blunder, there is no inadvertence, and no ignorance of the law, yet he is ultimately proved to have been wrong. A lawyer may be called upon to advise a client as to the state of the law on an issue as to which there is no clear statute or decision upon which he can rely. He must make an informed judgment as to what a court will do with an issue that has not as yet been litigated. Later events can of course prove him to have been wrong, and his client may sustain a loss. In such situations the attorney's carefully considered professional judgment was clearly wrong, yet the courts will almost always exonerate the attorney from malpractice liability in that type of situation. The rule has been variously stated by many courts in a variety of situations, but the statement set forth below sums it up:

If an attorney acts in good faith and in an honest belief that his acts and advice are well founded and in the best interest of his client, he is not held liable for a mere error of judgment. A fortiori, an attorney is not liable for an error in judgment on points of new occurrence or of nice or doubtful construction, or for a mistaken opinion on a point of law that has not been settled by a court of last resort and on which reasonable doubt may well be entertained by informed lawyers. And an attorney has no liability when he follows a decision of the highest court of his jurisdiction and the decision is later reversed by the Supreme Court of the United States [footnotes omitted].<sup>22</sup>

A very interesting case of this character involved a will incorporating a testamentary trust in which the trust failed in establishment because of violation of the California rule against perpetuities.<sup>23</sup> After holding that the disappointed beneficiaries of the trust could sue the attorney who drafted the will in spite of the fact that no attorney-client relationship existed between them, the court went on to hold that there was no liability on the part of the attorney who drew the

22 7 AM. JUR. 2D *Attorneys at Law* § 170 (1963).

23 *Lucas v. Hamm*, 56 Cal. 2d 583, 15 Cal. Rptr. 821, 364 P.2d 685 (1961).

will, in spite of the fact that he misunderstood the rule against perpetuities. The court held, in effect, that an attorney cannot be held liable for malpractice merely for failure to fully understand all of the very technical ramifications of such a complicated and difficult and misunderstood rule.<sup>24</sup>

There have been many other situations in which courts have exonerated attorneys because of misconceptions as to specific legal requirements, although usually they are situations in which the state of the law is genuinely in doubt, and is made certain only by subsequent decision.<sup>25</sup> There are all kinds of situations in which attorneys give advice to their clients as to what they feel the law is, or is likely to be, when it is not simply a problem of looking up the provisions of some statute, or an appellate court case that has clearly announced the rule, but on the contrary it is a matter of attempting to predict what some court is likely to do in the future with a legal issue that it has not yet faced. In most situations of this type, the courts have exonerated the attorney from malpractice in connection with his advice which has proven to have been erroneous. The rationale generally is that where the appellate courts of different jurisdictions disagree on the rule to be applied, or when the judges on a particular court are unable to agree unanimously on what the rule should be, an attorney cannot be expected to be infallible in such cases.<sup>26</sup>

Most attorneys, of course, when called upon to render an opinion on some unsettled point of law, will carefully point out that the issue is unsettled, and that no absolute answer to the issue can be given until the issue is resolved by the appropriate court, but nevertheless their client is going to act some way or other on the basis of the attorney's advice. But rarely will he win a malpractice case against the attorney when the attorney's guess proves to be wrong.

24 It is not entirely clear, in the *Lucas* case, whether the attorney did not understand the rule against perpetuities, or whether some phase of that rule was unsettled in California at the time he prepared the will. The opinion can probably be interpreted either way. In any event, for one indoctrinated in the law of medical malpractice it seems at least mildly surprising that the client has not at least made out a factual issue of malpractice upon demonstrating that the attorney's advice proved to be clearly and unarguably wrong. It is certainly a risky business to predict what the law will be several years hence on an unsettled, close issue of law, but as between the attorney and his client, at least on an issue such as was presented in *Lucas*, the client must rely on his attorney.

25 See Annot., 45 A.L.R.2d 5, § 3 [6] (1956).

26 The attitude of the courts on this subject has not changed much since *Babbitt v. Bumpus*, 73 Mich. 331, 41 N.W. 417 (1889) where an attorney suing for his fees was met with the defense of malpractice. The court said:

A lawyer is not an insurer of the result in a case in which he is employed, unless he makes a special contract to that effect, and for that purpose. Neither is there any implied contract, when he is employed in a case, or any matter of legal business, that he will bring to bear learning, skill, or ability beyond that of the average of his profession. Nor can more than ordinary care and diligence be required of him, without a special contract made requiring it. Any other rule would subject his rights to be controlled by the vagaries and imaginations of witnesses and jurors, and not infrequently to the errors committed by courts.

*Id.* at 337-38, 41 N.W. at 418-19.

The court goes on to point out that able attorneys frequently differ on interpretation of statutes, rules, contracts, and court decisions, and continues:

Under such circumstances, the errors which may be made by them must be very gross before the attorney can be held responsible. They should be such as to render wholly improbable a disagreement among good lawyers as to the character of the services required to be performed, and as to the manner of their performance under all of the circumstances in the given case, before such responsibility attaches.

*Id.* at 338, 41 N.W. at 419.

This certainly constitutes a limitation on the lawyer's malpractice liability which is not found, at least to the same degree, in the field of medicine. In a comparable situation the physician may escape liability, but rarely as a matter of law. If the physician escapes liability for his educated bad guess, it is more likely to be on a factual determination by the trier of fact that he was not negligent. With the attorney, he is likely to escape liability as a matter of law.

There is undoubtedly ample justification for such a difference in attitude, because of the very nature of the problems faced by lawyers in this area. There is simply nothing very scientific about the law. It is not governed by the inexorable rules of nature. Although there is some degree of symmetry to the law, and broad trends can frequently be detected, it is an extremely risky business to prognosticate what a particular jurisdiction is likely to do next on a particular narrow issue. Nevertheless the layman has no other resource for his guidance in such matters except his lawyer, and he expects and should expect competent professional advice and guidance even on the toughest issues, where he needs it most.

Probably the only real philosophical justification for protecting the lawyer from malpractice in such situations is plainly and simply the extremely difficult, and next to impossible problem which the lawyer faces in attempting to anticipate unpredictable courts and legislatures. It would almost seem that if the lawyer in such situations has presented to his client a reasonably fair review of the factors involved in the guessing game, then from that point on the client is in about as good a position to guess what the law will be as is his lawyer. Such might be an acceptable basis for testing the lawyer's discharge of his duty to his client, but the test applied by most of the cases seems to be more protective to the lawyer. If the issue is genuinely in doubt and unresolved, so that "good lawyers" might reasonably differ as to how the issue is likely ultimately to be resolved, then generally the lawyer is protected from malpractice.

### *B. Debatable Errors of Professional Judgment*

Beyond the class of cases where the attorney can be demonstrated to have been clearly wrong, although on an arguable and debatable issue of law (wherein the attorney usually escapes liability), there is a further class of situations, most likely to develop in the conduct of litigation, in which an attorney may be said to have exercised poor professional judgment, or to have demonstrated a lack of skill, from which his client sustained a loss.

There are all kinds of situations that can be imagined where the considered, good faith, honest judgment or technique of an attorney might be called into question. Every lawyer having any degree of contact with litigation is aware of situations wherein an attorney has used bad judgment in the preparation or conduct of a trial or an appeal. Perhaps he has lost a case he should have won or at least he obtained a poorer result than the real merits of his case deserved. He may have induced his client to pay more in settlement than other competent attorneys think the case was worth. He may have advised the refusal of a "reasonable offer of settlement" and proceeded to try the case and lose it. He

may have elected not to call certain witnesses available to him where other lawyers might feel he should have called them. He can ask that "one question too many" in cross-examination of a hostile witness which the trial symposium lecturers frequently caution us about. The possibilities for exercising a good faith judgment which other attorneys will consider wrong are endless. Everyone's hindsight is better than his foresight and the results of many trials would be different if the attorneys could start over again. Certainly based on the typical conversations in attorneys' lounges, it would not be hard to find a lawyer to point out the situations where some other lawyer used bad judgment or technique in the conduct of litigation. Certainly the skills brought to bear by lawyers in the courtrooms are no better, on the average, than the skills brought to bear by physicians and surgeons in the treatment of their patients. Yet one must search to find cases in the appellate reports where lawyers are accused of this type of bad judgment, and it is rare indeed to find a case where an award of damages is affirmed as a result of a good faith and conscientious exercise of professional judgment, which is wrong only in the eyes of some other lawyer.

A 1959 case in Minnesota involved several professional judgments of an attorney conducting litigation which were called into question by his disappointed client, and the court's opinion is as typical of the attitude of the courts in cases of this class as can be found.<sup>27</sup> The dispute arose in the first place when the attorneys sued for the balance of their fees, which also is rather typical. A good proportion of the situations in which attorneys are accused of malpractice in this sense seem to be initiated by this route. The client was a defendant in a personal injury suit arising from an elevator accident. The attorney advised the client that he thought the client was probably liable, and he should attempt to settle the case, and an attempt was made to settle the case which was unsuccessful because another defendant, separately represented, refused to participate in the settlement. The attorney therefore denied liability on the part of his client and the case went to trial and resulted in a verdict against all of the defendants. The client objected to paying fees because the attorney had advised that the client was liable and would probably lose the case, so that services disputing liability were unnecessary; he complained that the attorney mishandled the trial by failing to object to certain inadmissible evidence; in offering certain evidence; and in making certain arguments to the jury. Many of the charges seem frivolous, but of course there are a lot of frivolous claims in litigation that are left to juries to decide.

The court disposed of all these grounds as legal issues. As to the decision to go to trial and defend the case on all issues, the court said:

A conscientious lawyer usually gives his client a frank appraisal of any hazards faced by him as a defendant in a lawsuit. When he points out the hazards of a tort action brought against his client by expressing an *opinion* that his client will lose on the issue of liability, it does not necessarily follow that liability exists as a matter of law, or that regardless of the surrounding circumstances, liability may not be properly denied for the purpose of having an adjudication on the merits and this is especially true when that issue

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27 Meagher v. Kavali, 256 Minn. 54, 97 N.W.2d 370 (1959).

must, in any event, be litigated as to codefendants. Any realistic consideration of the circumstances in this case leads to the conclusion that plaintiffs were not negligent and that they adopted an ethical, reasonable, and prudent course for the protection of the interest of their clients. The trial court did not err in so instructing the jury.<sup>28</sup>

The attorney had taken an appeal from the adverse decision in the trial court in the underlying case and the client complained that the appeal was unwarranted since the attorney had advised that the client was probably liable and would probably lose the appeal. Because the codefendants had appealed, the court agreed that the appeal in question was reasonable and appropriate as a hedge against the possibility the codefendants might prevail.

It was claimed that the attorney was guilty of malpractice for failing to object to inadmissible evidence. It had apparently been ruled by a divided court on the appeal of the underlying case that the evidence was inadmissible, but that there was no error because no objection. On this point the court quoted from a North Carolina case:

An attorney who acts in good faith and in an honest belief that his advice and acts are well founded and in the best interest of his client is not answerable for a mere error in judgment or a mistake in a point of law which has not been settled by the court of last resort in his State and on which reasonable doubt may be entertained by well-informed lawyers.<sup>29</sup>

Clearly, the Minnesota court had no intention of leaving to a jury the opportunity to second-guess the attorney on questions of professional judgment and trial tactics which arise every day in every lawsuit. Although this is the usual attitude, situations can be found where lawyers have been subject to the possibility of malpractice liability on matters of tactics, but such situations appear to be rather gross, with the motivation of the attorney open to some question. Ethical considerations are usually involved.<sup>30</sup>

In a 1966 case arising in the seventh circuit, an attorney lost a malpractice claim to his client in the trial court, but won on appeal.<sup>31</sup> The attorney had conducted a substantial personal injury suit on behalf of his client, and suffered a verdict of no cause for action after eight days of trial, which was finally affirmed on appeal to the Supreme Court of Illinois. When the client sued the attorney for malpractice he alleged a variety of things: negligent preparation and presentation of the case, negligent preparation for and presentation of the testimony

28 *Id.* at 58-59, 97 N.W.2d at 374.

29 *Hodges v. Carter*, 239 N.C. 517, 520, 80 S.E.2d 144, 146 (1954).

30 *See Suritz v. Kerner*, 155 So. 2d 831 (Fla. 1963). An attorney was retained by a man who was injured in an industrial accident to bring suit for personal injuries against a third party (other than his employer) but failed to act promptly and the workmen's compensation carrier brought the suit as allowed by the Workmen's Compensation Law. Apparently hoping that that suit would be dismissed so that he could start suit on behalf of the injured man himself, the attorney instructed his client not to answer interrogatories addressed to him in the suit started by the WC carrier. Much to his chagrin, the dismissal was "with prejudice" and his client's claim was lost. The court held that a jury question was presented on this particular exercise of trial tactics.

31 *Dorf v. Relles*, 355 F.2d 488 (1966) (an appeal from the United States District Court for the Eastern District of Illinois).

of several witnesses, failing to seek proper counsel and advice and assistance during the course of trial, failing to make proper preparations for and conducting a poor opening statement and closing argument to the jury, negligently failing to inform the plaintiff of his limited trial experience, advising plaintiff that the only issue to be resolved in the case was the damages, failing to communicate a settlement offer of \$75,000.00, and failing to conduct proper settlement negotiations. At the trial of the malpractice case all of the above issues were disposed of by directed verdict by the trial judge except the last two, which were submitted to the jury. The jury awarded the client \$75,000.00. There is no discussion by the appellate court of the numerous issues on which a verdict was directed, and the appellate court finally reversed the case, ruling that a verdict should also have been directed on the last two issues. The specific basis for the appellate court's ruling was the lack of any expert testimony to support the plaintiff's charges, but one suspects on reading the opinion that if plaintiff had sworn an expert to support his charges of malpractice the court would have thought of something else. The court closed its opinion as follows:

We are not unmindful of the importance of the issue presented, not only to the parties but to all attorneys engaged in the practice of law. We are obligated to follow the reasoning of the Illinois courts and do so freely because we think the rule which requires expert testimony in a suit such as this is wholesome. If a judgment against an attorney, on a record such as is before us, can be justified, the legal profession would be more hazardous than the law contemplates. An attorney could hardly afford to take the chance of communicating with his client by any means other than in writing or by having a record made of every conversation between them. Otherwise, he would be amenable to an action for damages, oft-times by a client disgruntled because of an unfavorable result, with no way to disprove the client's version of what took place.

We hold that the court erred in its refusal to allow defendant's motion for a directed verdict. The judgment is reversed.<sup>32</sup>

It is not clear from the opinion in that case just what the evidence was with respect to the issues presented to the jury, relating to settlement negotiations. Presumably the attorney testified that he communicated the \$75,000.00 offer to the client, and the client denied it. The court does not comment on whether the attorney had an obligation to communicate that offer, but it is hard to believe that any court could excuse an attorney for not communicating a \$75,000.00 offer to his client in a personal injury case, whatever an expert witness might say about it. One suspects that the court was simply unwilling to believe that the offer was not communicated, in spite of the client's denial.

With respect to the failure to communicate a good faith, realistic and serious offer of settlement to his client, one would assume that the attorney's obligation is so clear, at least in the average situation, that liability would follow if the client could demonstrate his damages. Certainly circumstances can be imagined where the attorney would be under no duty or obligation to communicate a settlement offer, as where from prior discussions with the client, the attorney had

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32 *Id.* at 493-94.



good reason to believe that the client would refuse the offer. But the failure to communicate to the client a sincere and reasonable offer of settlement can hardly be said to be an erroneous exercise of professional judgment by an attorney. It would be more like pigheadedness.

The plain fact is that one simply cannot find any significant cases in the appellate reports in which the court has actually approved a substantial award against an attorney based upon a conscientious and intelligent exercise of professional judgment—a case where it is impossible to nail down an absolute rule and one must rely on some other attorney's judgment to say that the defendant was wrong. Does this really put the attorney in a favored position as compared to other professionals? If so, is there a justification for it?

### VIII. Rationale of the Lawyer's Favored Position

As to the first question, the answer is very probably yes. The attorney does enjoy a favored position in the law of malpractice, particularly in this important area of the exercise of professional judgment in situations in which there is no absolute answer to a problem. Although statements of the law can be found which would appear to evenhandedly apply the same rules to lawyers and doctors, nevertheless when it comes down to the nitty-gritty of a particular case, the lawyer appears to escape liability unless it can be shown that his action, whatever it was, was clearly and demonstrably wrong, and not merely called into question by some other lawyer who has a different opinion of it. The favored position is not so much in the stating of the rules of law, but in applying them to particular cases. There undoubtedly are cases disposed of at the trial court level, and cases disposed of without trial, in which lawyers have paid for the types of bad judgment that we are discussing. Some of the appellate cases represent borderline situations on the classifications that we have used. But certainly the broad picture is that lawyers incur far less risk of malpractice in their day-to-day professional judgments (provided they are ethical and honest, and don't overlook a specific statute or clear and obvious rule or requirement of the law), than do other professionals. What, if any, is the justification?

In connection with adversary matters generally, and most particularly in the broad area of litigation and preparation for litigation, one must keep in mind the peculiar situation of the lawyer, which is really quite different from that of other professionals.

A physician in undertaking to provide his services to his patient does so by bringing to bear whatever is calculated to improve the condition of his patient. But the patient is not in competition with anyone else. What helps the patient does not automatically hurt someone else. Everyone connected with the patient is interested in his good health, and no one will be damaged or disappointed by the success of the physician in treating his patient. If several physicians are involved with a single patient they are in a position to cooperate and work jointly for a single end: provide the proper diagnosis and treatment for the patient. With the attorney, on the other hand, particularly in connection with litigation, whether possible, threatened, or pending, the client is in competition with some-

one else. The client's rights are balanced by someone else's obligations. To the extent the attorney improves the position or standing of his client, he proportionately diminishes the standing and position of another.

Every attorney has the obligation to put forth his best efforts for his client, and in an adversary proceeding to present his client's case in the best possible light, consistent with applicable law, procedures, and ethics. While he is doing that, some other attorney is doing the same thing for the client's adversary. In most litigation, someone has to lose. Not everyone can win. And as long as we maintain the adversary system of litigation, an attorney will, and should, present his client's case and define his client's rights and obligations in the light most favorable to the client, provided there is a reasonable basis in the law to maintain that position. Under these circumstances attorneys must be given great leeway in the exercise of judgment and in the giving of advice to clients, without fear of a malpractice claim if they turn out to be wrong.

In just about every lawsuit there are one or more winners, and one or more losers. If the case was worth litigating in the first place, we must conclude that there was more than one way the case could have come out. Otherwise, the parties should have made a settlement. There is certainly nothing very scientific about trial tactics or guessing what juries will do. There is not much more basis to guess what a judge will do on issues of fact, and the flood of cases in the appellate reports demonstrates how frequently attorneys can be mistaken as to what judges will do on questions of law. When attorneys are engaged in such guessing games, it is unrealistic to hold them liable for a bad guess.

On the other hand, the medical profession is essentially scientific. To a large degree specific combinations of symptoms indicate certain things, and particular treatments, under given conditions, have predictable results. A well-informed physician can usually make a better prognosis as to what will result from a course of treatment than the most skillful trial attorney attempting to predict the result of a lawsuit.

There are undoubtedly lots of reasons why lawyers are subject to far less frequent malpractice claims than doctors, and basic control of the apparatus of adjudication is undoubtedly one of them. The "conspiracy of silence" often attributed to the medical profession in malpractice matters certainly has its counterpart in the legal profession. Lawyers are inclined to discourage claims against other lawyers for malpractice, just as physicians are inclined to discourage medical malpractice claims. However, lawyers are in a much better position to limit claims against themselves as a group than are the physicians. The apparatus for starting the suit, whether against a doctor or a lawyer, is in the hands of the lawyers. This is the point at which claims can be most effectively discouraged. Once a suit is started, witnesses can be subpoenaed and a "conspiracy of silence" can usually be overcome. A lawyer is needed to commence and prosecute a case and this factor is undoubtedly an unavoidable depressant upon malpractice claims against lawyers.<sup>33</sup> But this factor is balanced, to some

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<sup>33</sup> It is recognized that in most jurisdictions, at least, individuals can represent themselves in court, and are not absolutely required to retain a lawyer. But it is not often done except in small claims courts.

degree, by the fact that with respect to a large part of the work that an attorney does there are other attorneys with an adverse interest who are in a position to know something about the quality of his service. Other professionals are much more likely to work alone or in cooperation with their peers, rather than in competition with them.

There seems to be no way to really determine whether all of these factors, taken together, are likely to encourage or discourage malpractice claims against lawyers. Perhaps the best explanation for the relative dearth of cases against lawyers is the rather marked lack of success of those who have brought them. Very likely the basic factors of the marketplace have more bearing on the frequency of lawyers' malpractice cases than the fraternity feeling among members of the bar.

The more important question is whether the relative immunity of lawyers with respect to certain types of malpractice claims is justifiable from the point of view of society as a whole. Here again, the basically adversary nature of the legal profession, which is unique among all the professions, is the important overriding factor which both explains and justifies the favored position enjoyed by lawyers in the field of professional malpractice. As has already been pointed out lawyers are dealing generally with rights and liabilities of their clients which are in competition with reciprocal liabilities and rights of others. By the very nature of things in adversary matters, a lawyer only rarely can accomplish for his client everything which the client has set his sights on, but to the extent that he does so it is usually at the expense of someone else whose lawyer, in the eyes of *his* client has failed. If a suit for malpractice could be maintained against an attorney whenever some other lawyer felt his professional advice was poor or his skills as an advocate below par, there would be one or more potential malpractice cases arising from just about every lawsuit, as well as many other business and commercial disputes. Obviously not all such potential claims would be sued upon. Nevertheless if jury issues could be anticipated in that kind of situation there would probably be an adequate number of lawyers available to sue the claims against their fellows on contingent fee contracts. So long as the courts continue to consistently rule that a lawyer is immune from such claims, there is little to gain, and much time and expense to lose, in starting such a suit. But if the directed verdicts could be avoided, if jury questions could be expected as to the lawyers' good faith judgment calls, lawyers would certainly be sued for malpractice much more frequently than they are. Certainly, if such matters were jury issues there would be many more potential lawyers' malpractice cases than medical malpractice cases. By the very nature of things a very large percentage of people requiring legal services end up disappointed in the sense that they have not achieved, as against their adversary, what they had hoped to achieve. In juxtaposition most people accomplish what they set out to achieve when they consult their physician.

The sheer numbers of potential claims that might be generated against attorneys are staggering, and the impact upon the lawyer's time and energies and upon our already overloaded courts would be substantial. But more important, and more sinister, would be the impact on the very structure of the legal profes-

sion and upon the adversary system of justice. Lawyers are expected to be advocates in many of the most important phases of their work, and the dynamic development of the law and all of our social and economic relationships depend to a large extent on the effective performance by the lawyer of his role as advocate. He should not be discouraged by threat of malpractice litigation from fully performing that role. If he were subject to a suit for malpractice whenever his client failed to obtain expected (or hoped for) results, the attorney might tend to become more of a father confessor than advocate—discouraging the legitimate aspirations of his clients. Society, and the law, might well tend to stagnate.

It is not the purpose of this article to discuss the merits or deficiencies of malpractice law as it applies to the medical profession, nor to engineers, architects, and other disciplines. The physicians feel much abused, and they tend to a substantial degree to blame the lawyers for the situations that they face. But the solutions to the problems of the medical profession do not lie in spreading those problems to the legal profession. There are significant differences between the two professions which must be taken into account in developing policies as to malpractice liability.

### IX. Conclusion

It would appear that there are areas where there can be expected to be a liberalization of the law of malpractice as it applies to lawyers. Particularly, it would appear that the lawyers' liability is likely to extend beyond his clients in certain limited situations, as it probably should. It is conceivable that the burden of proof of certain elements in a malpractice case might reasonably be shifted to the attorney. But it would certainly seem that if attorneys were subject to a suit for malpractice for every alleged error of professional judgment that could be demonstrated by hindsight, or by the opinion of another client's lawyer, we would have an intolerable situation of one or more potential attorneys' malpractice cases arising from just about every trial in all our courts, the role of the lawyer as *advocate* would tend to be discouraged, and the continuing dynamic development of law and society would be dampened.

The study of this subject was prompted in part by questions posed by many doctor friends as to why so many doctors are sued for malpractice, and so few lawyers. When you really get down to examining the literature, the disparity is quite surprising. When the fraud and breach of trust cases involving lawyers are eliminated, it is even more amazing. Most lawyers today presumably carry malpractice insurance, and well they should. They are susceptible to many different kinds of errors which can cause loss to their clients. Insurance companies writing malpractice insurance for lawyers pay quite a few claims, arising from a variety of situations, but they are usually the more or less obvious and usually inadvertent mistakes outlined in the earlier part of this article. The small number of attorneys' malpractice cases reaching the appellate courts is not an indication that attorneys do not commit malpractice, nor that they avoid liability for their malpractice. Most of the claims against attorneys are for money or property and are much more easily adjusted as to value than personal injury and death claims.

facing physicians, and undoubtedly a greater proportion of them are settled before reaching the courts. Certainly in situations with an element of breach of ethics or breach of fiduciary relationship, lawyers are frequent and vulnerable targets. But in the broad area of the good faith and conscientious exercise of professional judgment, particularly in adversary matters, lawyers have traditionally been and should continue to be relatively immune to the risk of malpractice. A significant increase in that risk would have a very great, but unpredictable impact on the adversary system of justice, and the role of the lawyer in that system.